

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER LYMAN, a/k/a JENNIFER
WYEFFELLS,

Plaintiff-Appellee,

v

PHILIP J. BELLOMO II,

Defendant-Appellant.

UNPUBLISHED
December 28, 2010

No. 294733
Macomb Circuit Court
Family Division
LC No. 2002-005932-DS

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order adopting a recommendation by the Friend of the Court that there had been no material change in circumstances to warrant an evidentiary hearing on a request for a change in custody. We reverse and remand for further proceedings.

In this case, the trial court entered a consent judgment of support on March 25, 2003, which stated that it was a "final judgment," and it "resolve[d] the last pending claim and close[d] this case." Despite the "final judgment" language, the order did not contain an order of permanent custody. It instead contained only what was termed an "interim" provision regarding custody, which provided that plaintiff "shall have sole legal and physical custody of said minor child(ren) until further order of the court." With respect to parenting time, the judgment provided, "the non-custodial parent [defendant] shall have reasonable parenting time until further order of the court." The order was not the result of findings on the best interest factors¹ and there was no hearing on those factors.

¹ Pursuant to MCL 722.23, the best-interests factors are: (a) The love, affection, and other emotional ties existing between the parties involved and the child; (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any; (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and

Defendant contends that, because the custody order at issue was a temporary custody order, he is not required to show proper cause or a change in circumstances before the trial court may consider a change in custody pursuant to the Child Custody Act, MCL 722.21 *et seq.*, and hold an evidentiary hearing on the best interest factors. We agree.

Although child custody cases generally apply three standards of review, in this case, we are looking at the trial court's interpretation or application of the law, which this Court reviews for clear legal error. See *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009).

"MCL 722.27(1)(c) provides for modification of a custody order on 'proper cause shown' or '[a] change of circumstances.'" *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001), quoting MCL 722.27(1)(c) (alteration in *Foskett*). "On the basis of this language . . . if the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). However, temporary custody orders are the exception to this rule. *Thompson v Thompson*, 261 Mich App 353, 357; 683 NW2d 250 (2004). "By definition, a temporary custody agreement is only a temporary order pending further proceedings." *Id.* That is, a temporary custody order is not an original or initial order. *Id.* at 361-62. Therefore, this type of order is outside the scope of the Child Custody Act. MCL 722.27(1)(c). As such, a defendant may not be denied a full evidentiary hearing just because he or she has stipulated to "temporary custody." *Thompson*, 261 Mich App at 357. Although defendant stipulated to the temporary order, this does not absolve the trial court of the requirement of determining the best interests of the children prior to entering a permanent order. See *id.* at 359 (holding that although a trial court will enforce temporary custody agreements, "parties cannot conclusively agree regarding child custody"). A trial court is not permitted to "blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000).

Accordingly, we conclude that the trial court must conduct an evidentiary hearing on the best interest factors and after evaluating all of the best interest factors, determine custody based upon the best interests of the child. *Id.* at 363.² On remand, because an original finding

other material needs; (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity; (e) The permanence, as a family unit, of the existing or proposed custodial home or homes. (f) The moral fitness of the parties involved; (g) The mental and physical health of the parties involved; (h) The home, school, and community record of the child; (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference; (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents; (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child; and (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

² In light of this determination, we need not consider defendant's alternative argument that he did, in fact, show proper cause or a change in circumstances. We note, however, that the trial court's conclusion that defendant had failed to show proper cause or a change in circumstances is inconsistent with its conclusion that it could modify parenting time. See *Terry v Affum*, 237

concerning best interests was never issued, the parties are not precluded from offering evidence that originated prior to the entry of the interim order, but may use evidence, occurring from any time. See *id.* at 355-357.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro

Mich App 522, 534-535; 603 NW2d 788 (1999).